

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of

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**Amendment to the Commission's Rules
To Permit Flexible Service Offerings
in the Commercial Mobile Radio Services**

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WT Docket No. 96-6

To: The Commission

**COMMENTS OF
CELLULAR MOBILE SYSTEMS OF ST. CLOUD GENERAL PARTNERSHIP, LLP**

Cellular Mobile Systems of St. Cloud General Partnership, LLP ("CMS"), by its attorneys, and pursuant to the invitation extended in the Federal Communications Commission's ("FCC" or "Commission") Public Notice released September 25, 1997 (DA 97-2083), hereby submits these comments in response to the Petition for Partial Reconsideration or Clarification ("Petition") filed by BellSouth Corporation ("BellSouth") in the above-captioned proceeding. BellSouth in its Petition asks the Commission to eliminate Section 22.323 of its rules and regulations which authorizes the provision of fixed wireless service offerings on an "incidental" basis. For the reasons discussed below, CMS urges the Commission to retain this rule provision.

Statement of Interest

CMS is a licensed provider of cellular telephone service in the St. Cloud, Minnesota Metropolitan Statistical Area. CMS also provides Basic Exchange Telephone Radio Service on an incidental basis pursuant to Section 22.323 of the Commission's rules. CMS is also considering utilizing its licensed cellular frequencies to provide a new incidental service offering,

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a dual-use wireless service capable of being used in either a mobile or fixed mode, depending on the customer's location. CMS will therefore be directly affected by any elimination or revision of Section 22.323.

Discussion

BellSouth contends that, in permitting all commercial mobile radio service ("CMRS") providers to utilize their licensed spectrum for fixed service offerings in its *First Report and Order and Further Notice of Proposed Rulemaking*¹ in this proceeding, the Commission "inadvertently" retained Section 22.323. BellSouth bases this contention on the statement in the *R&O* that:

[r]ather than continuing to define allowable fixed services in terms of whether they are "ancillary," "auxiliary," or "incidental" to mobile services, we conclude that our rules should more broadly allow fixed services to be provided on a co-primary basis with mobile services.

R&O, 11 F.C.C.R. at 8973. Plainly read, this statement clearly does not indicate any intention on the Commission's part to eliminate Section 22.323. It simply states that the Commission no longer wishes to *limit* the provision of fixed services to three regulatory classifications (ancillary, auxiliary, and incidental), and confirms the Commission's intent to "broaden[] the potential scope of fixed services that may be offered by CMRS providers"² by now permitting fixed services to be provided on a co-primary basis with mobile services. Indeed, the FCC's News

¹ *Amendment of the Commission's Rules to Permit Service Offerings in the Commercial Mobile Radio Services*, WT Docket No. 96-6, *First Report and Order ("R&O") and Further Notice of Proposed Rulemaking ("FNPRM")*, 11 F.C.C.R. 8965 (1996).

² *FNPRM* at paragraph 48.

Release announcing the adoption of the *R&O* stated that “[t]he rules adopted today replace rules that *limited* certain CMRS providers to offering fixed services on an ‘ancillary,’ ‘auxiliary,’ or ‘incidental’ basis to mobile services.” FCC News Release, Report No. DC 96- ///, *FCC Votes to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, released June 27, 1996 (emphasis added).

Apart from its reliance on its contention that the Commission intended to eliminate Section 22.323 but inadvertently forgot to do so, BellSouth argues that the rule should be eliminated or modified due to its potential “chilling effect” on the provision of fixed services by Part 22 licensees. Specifically, BellSouth is concerned that CMRS licensees may be dissuaded from providing fixed services under Section 22.901 out of a fear that they may somehow be classified as providers of incidental fixed services under Section 22.323, and thereby be subject to the requirements that they notify the Commission prior to commencement of service and that such service be provided as an adjunct to the “primary” mobile service offering. The FCC’s rules clearly state that a CMRS licensee may provide fixed service on a co-primary basis pursuant to Section 22.901³, and that if it wishes to provide such service on an *incidental* basis it must specifically notify the FCC prior to commencement of the fixed service pursuant to Section 22.323. However, if the Commission nonetheless wishes to clarify that Section 22.323

³ Section 22.901 by its terms governs only the provision of fixed services by *cellular licensees*. Similar provisions that relate to personal communications service (“PCS”) and Part 90 licensees can be found in Sections 24.3 and 90.419 of the Commission’s rules, respectively. For convenience, references in these comments to Section 22.901 should be read to encompass Sections 24.3 and 90.419 as well. In view of the inconsistent wording of these provisions which are intended to apply equally to all CMRS providers, CMS suggests that the Commission modify Sections 24.3 and 90.419 to either reference or read the same as Section 22.901. In addition, Section 22.901, 24.3 and 90.419 in aggregate do not encompass *all* CMRS services (*e.g.*, paging and air-ground radiotelephone service).

does not apply to any services offered pursuant to Section 22.901 as BellSouth suggests, CMS does not oppose such a clarification.⁴

The thrust of BellSouth's petition is that, in light of the changes brought about by the *R&O*, Section 22.323 no longer serves a useful purpose. What BellSouth fails to recognize is that there are significant regulatory distinctions between fixed services provided on an incidental basis pursuant to Section 22.323, and those provided on a co-primary basis pursuant to Section 22.901. Most significantly, incidental services offered by CMRS providers fall within the statutory definition of "mobile service," and are subject to CMRS regulation. *FNPRM* at paragraph 48. As such, they are protected from burdensome state and local rate or entry regulation by Section 332 of the Communications Act of 1934, as amended ("the Act"). 47 U.S.C. Section 332. The issue of whether fixed services offered on a *co-primary* basis are deemed "mobile services" and therefore subject to the protection of Section 332 is currently pending before the Commission in the *FNPRM* phase of this proceeding. Accordingly, the only way a CMRS provider can offer any type of fixed services on its CMRS frequencies with the

⁴ BellSouth asks the Commission to "clarify that Section 22.323 does not apply to any services offered pursuant to Section 22.901 or the *Report and Order*." Petition at p. 3, n. 1. CMS does not oppose this request to the extent it seeks confirmation that a CMRS licensee offering fixed services *on a co-primary basis* pursuant to the terms of Section 22.901 cannot also be classified as incidental for those same services. However, to the extent that BellSouth's request could be interpreted as a request that *all* services that are *eligible* to be treated as co-primary services under Section 22.901 (*i.e.*, fixed wireless services) be regulated under Section 22.901 and not Section 22.323, notwithstanding the licensee's desire to take advantage of the regulatory protections offered by Section 22.323, CMS vigorously opposes such a request.

assurance that it will not be subject to burdensome state or local regulation⁵ is to offer such services on an incidental basis pursuant to Section 22.323.

To obtain the benefits of this safe harbor protection, a provider of incidental fixed services must put up with additional regulatory restrictions. Unlike a co-primary fixed service offered pursuant to Section 22.901, an incidental fixed service offering is indeed “incidental.” While under Section 22.901 a CMRS licensee may utilize its licensed frequencies to offer fixed service *exclusively*, a licensee offering fixed services on an incidental basis under Section 22.323 may only do so as an adjunct to its primary mobile service offering. Although the Commission has declined to place a quantitative limit on the amount of airtime that may be used to provide incidental service⁶, its informal policy with respect to at least one category of CMRS has been that cellular frequencies be used “predominantly” for the provision of mobile cellular service.

Another restriction applicable to providers of incidental fixed services is the requirement that they notify the Commission prior to the provision of such services. *See* 47 C.F.R. Section 22.323(d). BellSouth claims that the notification requirement “serves no practical purpose.” Petition at p. 3. To the contrary, this requirement serves a unique and valuable

⁵ CMS’s concern with the prospect of state rate and entry regulation of fixed service offerings is not an idle one. With few exceptions, most states are anxious to regulate and tax wireless telecommunications providers. The current uncertainty regarding the federal regulatory classification of fixed services provided on a co-primary basis by CMRS licensees provides state regulators with just the opening they may be looking for to assert jurisdiction over wireless service offerings.

⁶ *Revision and Update of Part 22 of the Public Mobile Radio Services Rules*, 95 FCC2d 769, 819 (1983) (rejecting a proposal by AT&T that it impose a 10% airtime limit on incidental services).

regulatory purpose. Because no Commission authorization is required to provide fixed services on CMRS frequencies, the only way for the FCC and the public to know whether a carrier is providing such services on a co-primary or an incidental basis (and therefore whether such carrier is complying with the relevant regulatory obligations for its specific service offering) is if the carrier files a notification that it is providing incidental service pursuant to Section 22.323(d). From the carrier's perspective, notification serves as official notice to both federal and state regulatory bodies that fixed service is being provided on an incidental basis and is therefore not subject to state rate or entry regulation.

Accordingly, although to the customer the fixed services provided on a co-primary or incidental basis may be similar if not identical, the regulatory "boxes" associated with each service are quite distinct, and from a CMRS provider's perspective, quite significant.⁷ The regulatory distinctions between co-primary and incidental fixed services under Sections 22.901 and 22.323 serve a useful and important purpose and should be preserved. At a minimum, the Commission should continue to grandfather the regulatory treatment currently afforded licensees offering incidental fixed services as intended under the *R&O*.⁸

⁷ From the perspective of a provider of paging or air-ground radiotelephone service, the differences are critical. As noted in footnote 3, *supra*, the rules adopted by the Commission in its *R&O* to permit the provision of fixed services on CMRS frequencies on a co-primary basis do *not* by their terms apply to paging and air-ground radiotelephone service. Accordingly, for such carriers, the *only* way they can provide fixed service on their licensed paging or air-ground frequencies pursuant to the Commission's rules is do so on an *incidental* basis pursuant to Section 22.323.

⁸ See *R&O* at paragraph 4 ("We do not intend to alter the regulatory treatment of licensees offering the ancillary, auxiliary, and incidental fixed services that have been offered by CMRS providers under our rules prior to this order."); *FNPRM* at paragraph 48 ("[W]e emphasize that

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For the foregoing reasons, CMS respectfully requests that the Federal Communications Commission retain Section 22.323 of its rules, deny BellSouth's Petition and otherwise act in a manner consistent with the views expressed herein.

Respectfully submitted,

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Dated: November 12, 1997

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our decision to allow carriers to offer co-primary fixed services on spectrum allocated for CMRS does not alter in any way our regulatory treatment of fixed services that have been provided by CMRS providers under our prior rules.”).

Certificate of Service

I, Jacqueline Jenkins, an employee in the law firm of Bennet & Bennet, PLLC hereby certify that a copy of the foregoing Comments of Cellular Mobile Systems of St. Cloud General Partnership, LLP has been served this 12th day of November 1997, via first-class U.S. postage pre-paid mail on the following:

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